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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,
vs.

LEVON CORDINGLEY,

Defendant-Appellant.

SUPREME COURT NO. 39518-2012

APPELLANT'S REPLY BRIEF

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE KATHRYN STICKLEN
DISTRICT JUDGE**

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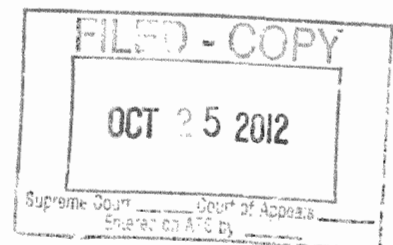


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STATEMENT OF THE CASE

A. Nature of the Case

Mr. Cordingley appeals from district court's order affirming the magistrate's denial of his motion to dismiss misdemeanor charges of possession of paraphernalia and marijuana. Cordingley asserted a violation of his right to religious freedom as guaranteed by the First Amendment to the United States Constitution, Article I, Section 4 of the Idaho Constitution, and Idaho Code (I.C.) § 73-402 (Idaho Free Exercise of Religion Protected Act). The magistrate found, and the state now contends, that Cordingley's use of marijuana was for other than a religious purpose under FERPA, Idaho Code 73-402.

Mr. Cordingley testified that he is an ordained minister, founder, and president of the Church of Cognitive Therapy, based in Portland, Oregon. He is also a follower of the Rastafarian religion. Mr. Cordingley alleged that his conviction under I.C. §§ 37-2732 and 37-2734(A) has substantially burdened his right to religious freedom guaranteed him under Idaho Code § 73-402, FERPA as well as the federal counterpart, 42 U.S.C. §§ 2000bb, the First Amendment of the United States Constitution, and Article 1, §§ 4 and 13 of the Idaho Constitution, and the 1st and 14th Amendments to the United States Constitution.

Cordingley testified that cannabis is a "sacrament" and has been used in religious services for over 10,000 years. He and all members of his Church of Cognitive Therapy (COCT) carry it on their persons in containers clearly marked "sacrament" with the words, "[t]he sacrament for the Church of Cognitive Therapy, using the full exercise of religious belief. Not for sale. . . ," and that when it is used in conjunction with prayer,

it aids and comforts those people in need. The central tenant of belief is that the sacramental use of cannabis leads to spiritual enlightenment and brings one closer to the creator of the universe, or god. The use of cannabis is for the same purpose of meditation and prayer, practices common in most religions. Minister Cordingley testified that the use of cannabis was "vital and mandatory" in his everyday practice of the Rastafarian religion, to which he is a member. Cordingley testified that there are as many as twelve million people on this planet that use cannabis as part of their everyday practice of religion.

The State of Idaho contends that the magistrate was correct in denying Cordingley protection under FERPA because his use of marijuana does not constitute the "exercise of religion." *Respondent's Brief*, p. 5. The State of Idaho contends that Cordingley's Church of Cognitive Therapy, COCT, is not really a church because it is non-denominational and includes beliefs of enlightenment, a term not commonly used in Christian religion. The state argues:

The magistrate court denied court Cordingley's motion to dismiss finding the COCT is a community with an emphasis on spirituality, rather than emphasis on any particular religious beliefs. The goal is enlightenment and can be had by Catholics Jews, and even Atheists. Ultimately the only connecting fiber among the various members is their use of marijuana to help in the pursuit of enlightenment. *Respondent's Brief*, pp. 7-8.

Cordingley acknowledges that COCT church utilizes the Bible as well as other texts as everyday tools to understand the path of enlightenment and the meaning of god, but rejects the State's narrow view of religion and his legitimate practice of Rastafari, a theocentric religion based upon the Bible. Cordingley also rejects the State's misguided attempt to discriminate against other religions seeking enlightenment

without the necessity of a theocentric god, i.e. Buddhism, but that is his not his personal belief or central to the arguments in this case.

Cordingley contends that the evidence overwhelmingly supports that his use of marijuana was “principally motivated” by his religious belief. *State v. White*, 152 Idaho 361, 271, P.3d at 1221. Cordingley finally contends that there is no support for the State’s contention that the prohibition of marijuana possession is based upon a compelling governmental interest or reasonably tailored to protect his religious freedom.

B. Standard of Review

On review of a decision of the district court, rendered in its appellate capacity, this court reviews the decision of the district court directly. *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011). The Court must “examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings.” *State v. DeWitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct.App.2008). The court exercises free review of the application and construction of statutes. *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011).

ISSUE

Did the district court err when the court affirmed the magistrate's decision denying Mr. Cordingley's motion to dismiss under Idaho Code § 73-402 (FERPA)?

C. Legal Standard of Review Under FERPA.

In 2000, Idaho enacted the Free Exercise of Religion Protected Act, Idaho Code § 73-402, FERPA, resurrecting the higher “compelling interest test” standard in religious exercise cases. This Act allows the State government to “substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both: (a) [e]ssential to further a compelling governmental interest; [and] (b) [t]he least restrictive means of furthering that compelling governmental interest.” I.C. § 73-402(3).

Idaho Code Section 73-401, et seq., states, in relevant part:

73-402. Free exercise of religion protected.

(1) Free exercise of religion is a fundamental right that applies in this state, even if laws, rules or other government actions are facially neutral.

(2) Except as provided in subsection (3) of this section, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.

(3) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both:

(a) Essential to further a compelling governmental interest;

(b) The least restrictive means of furthering that compelling governmental interest.

(5) In this section, the term "substantially burden" is intended solely to ensure that this chapter is not triggered by trivial, technical or de minimus infractions.

Additionally, the Act provides the following definitions in Idaho Code § 73-401:

(1) "Demonstrates" means meets the burdens of going forward with evidence, and persuasion under the standard of clear and convincing evidence.

(2) "Exercise of religion" means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory

or central to a larger system of religious belief.

(5) " Substantially burden" means to inhibit or curtail religiously motivated practices.

In a recent decision, *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011), our Idaho Court of Appeals adopted the legal standard set forth under the RFRA (Religious Freed Restoration Act) as "instructive" as to the legal standard necessary to prove a FERPA claim. *White at p.364*. To establish a prima facie claim, a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an " exercise of religion." Second, the government action must " substantially burden" the plaintiff's exercise of religion. If the plaintiff cannot prove either element, his claim fails. Conversely, should the plaintiff establish a substantial burden on his exercise of religion, the burden of persuasion shifts to the government to prove that the challenged government action is in furtherance of a " compelling governmental interest" and is implemented by " the least restrictive means."

ARGUMENT

In *State v. White*, 152 Idaho 361, 271 P.3d 1217 (Ct. App. 2011), review denied (Mar. 21, 2012), the Court of Appeals for Idaho determined that the Defendant, Cary W. White's use of marijuana was not supported by evidence of use for substantial religious beliefs. In *White*, the defendant did not consider himself to be a "member of any legally-recognized religion such as the Church of Cognitive Therapy, Rastafarianism (which the Ninth Circuit has recognized involving the use of marijuana as a sacrament), and Native American Medicine." *White at p. 367*. *White* offered a variety of explanations for his use of marijuana, including "freedom" and "health." Ultimately, the Court of Appeals

could not find that the magistrate had erred in concluding that White's use of marijuana was not directly linked to spiritual belief. This case is easily distinguished from Mr. Cordingley's case, because it can only be fairly said that Mr. Cordingley's life and church are centered on the religious use of cannabis as a sacrament.

Cordingley's proof greatly exceeds the proof necessary to shift the burden to the government, but it is important to note that even a "central belief" is not necessary to gain the protection of religious freedom. As the court noted in *White*:

the religious motivation test is generally considered the broadest of the three, as it allows protection for both central and non-central practices, extends protection to all religious groups, and allows a court to forgo the difficult task of determining the importance of certain religious practices in a claimant's life. *Warner*, 887 So.2d at 1033; *Coronel v. Paul*, 316 F.Supp.2d 868, 878-79 (D.Ariz.2004). However, the test does outline key limitations. First, it requires the claimant to demonstrate that religion principally motivated the activity in question. *Id.* at 879; *Rouser v. White*, 944 F.Supp. 1447, 1455 (E.D.Cal.1996). *White*, footnote 3 at p. 373.

In the application of the religious motivation test, this court should note that Mr. Cordingley's personal religious belief in the use of marijuana is based upon Rastafari, a religion that now has many millions of followers worldwide. The fact that COCT is a church formed for the organized use of a sacrament on the path to enlightenment or communion with god does not undermine his sincere belief that marijuana is a sacrament of Rastafari, his religion. There is no other record or testimony before the court.

Mr. Cordingley testified that he is a founding member of the Church of Cognitive Therapy. Mr. Cordingley has never stated that he is not a member of a legally recognized church. Mr. Cordingley explained that his church is an organized, spiritual community comprised of anywhere between five to twenty believers (Tr., p. 41, Ls. 19-

25) of different religious systems, including but not limited to Buddhists, Rastafarian Christians and others that utilize cannabis as a component of their beliefs to reach spiritual enlightenment. (Tr., p. 30, Ls. 20-25 – p. 31, Ls. 1-2, p. 58, Ls. 1-14). The exclusive purpose of the Church is to use cannabis as a sacrament to achieve spiritual enlightenment. (Tr., p. 59, L. 25 – p. 60). There would be no COCT without the use of cannabis. (Tr., p. 51, Ls. 4-25 – p. 52, p. 53, Ls. 1-9). The entheogenic use of cannabis is required for every member, because the only purpose for the COCT is to utilize sacramental cannabis to reach spiritual enlightenment, spiritually connect with their universe, their creator, and become better people. (Tr., p. 60). Again, there is nothing in this record to indicate that these beliefs are insincere or other than religious in nature.

At the core of the Magistrate's flawed decision is the inability to recognize a non-Christian based religion as legitimate. The differences between enlightenment and god in East and West may not be readily understandable by us that are not Buddhists, but such a distinction cannot form the basis for protection of religious belief.

The State of Idaho remains confused by the difference between a church and a religion. By common definition a church is a building where people meet and practice their belief; usually it is an organized religion, but nothing prohibits the gathering of religious people in a non-denominational church or from partaking of the sacrament in whatever church they may choose to attend that day. In the same light, there is nothing casual or insincere about the use of marijuana to connect to the higher power. The examples of religious people using medicines, roots, herbs, and alcohol in their practices throughout history are manifest and well known. Native Americans use peyote, while original people in Central America may use the bark of a tree. How this

differs from the rituals of burning incense, consuming wine or the body of Christ is a matter of belief, not of reason. There is no question that Rastafarians are many in number and sincere in their belief that marijuana is the path to the higher power.

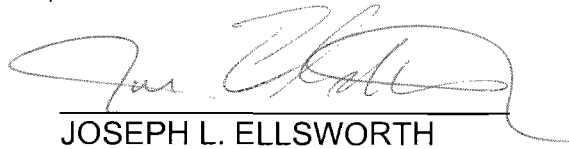
COCT is a church organized for the purposes of using this common sacrament; Mr. Cordingley is a minister and founder of this church, an organized group that is formed for a religious purpose. The Idaho Legislature created the protection now relied upon by Mr. Cordingley. He respectfully asks the court to uphold FERPA as applied to his religious belief.

Finally, there is nothing in the record to support any finding of a compelling state interest in prohibiting Mr. Cordingley from using marijuana. There is no evidence in the record Mr. Cordingley was involved in some kind of behavior injurious to the health or safety of others. There is nothing in the record to support a conclusion that marijuana is dangerous or may not be used in a reasonable, safe and religious manner. The State's case must fail.

CONCLUSION

The Court should reverse the decision of the magistrate and set aside the judgment of conviction.

DATED this 24th day of October, 2012.


JOSEPH L. ELLSWORTH
Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

Idaho Attorney General
Criminal Division
P.O. Box 83720-0010



JOSEPH L. ELLSWORTH
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